Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-921

JEROME RAPOPORT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1976

No.

JEROME RAPOPORT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jerome Rapoport, petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on November 4, 1976.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix, *infra* at 1a) is reported in ___F.2d___ The opinion of the District Court below was not reported.

JURISDICTION

The judgment of the court below was entered on November 4, 1976. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. The United States Court of Appeals for the Second Circuit has incorrectly expanded the scope of 18 U.S.C. §2(b) to a case properly brought under 18 U.S.C. §2(a).

II. In his rebuttal summation, the prosecutor said that even the best lawyer money can buy could not save the defendant. This statement was so improper under the circumstances as to require a new trial.

III. The conviction for false swearing was based upon testimony which was immaterial when given during cross-examination at Rapoport's second trial.

IV. The conviction of the Entre Nous loan should have been reversed and the count dismissed by reason of government misconduct amounting to participation in the crime alleged.

STATUTES INVOLVED

18 U.S.C. §2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

STATEMENT OF THE CASE

Petitioner, Jerome Rapoport, appeals from a decision affirming his conviction, by the United States Court of Appeals for the Second Circuit, entered on November 4, 1976.

The judgment of conviction was entered by the United States District Court for the Southern District of New York, Honorable Charles L. Brieant, Jr., United States District Judge presiding, after having been found guilty by a jury of several counts of causing the filing of false applications for loans guaranteed by the Small Business Administration, Title 18, United States Code, Sections 2(b), 1001, 1014, and one count of swearing falsely at a previous jury trial, Title 18, United States Code, Section 1623.

Petitioner, the government charged, had entered into agreements, disguised as consulting arrangements, with several financially hard-pressed businessmen, pursuant to which petitioner was engaged to "find" Small Business Administration ("SBA") financing in exchange for contingent fees of ten percent of the loan sought. Petitioner advised his respective clients not to make disclosure of the finding agreements in their loan applications since petitioner, a former SBA employee, knew the SBA would reject loan applications which revealed that finder's fees were being paid. Petitioner contended that as a consultant his name was not required on the application. The government's testimony indicated that as a consultant petitioner's name need not be on the application, but, then proceeded to attack the consulting agreements as shams through the use of the testimony of immunized witnesses. Accordingly, Item 10 of the loan applications, where disclosure of compensation paid for "services of any nature whatever" in connection with the loans was to be made, was in all but one case answered incompletely by the responding businessmen. In the one instance, the applicant, Allan Pollak of Entre Nous Graphics, Inc., answered "None".

The government initially charged petitioner only with respect to the Entre Nous transaction. Petitioner, however, steadfastly maintained his innocence, testifying at his first two trials, in his own behalf that the fee arrangements, rather than being compensation for "finding" services to be rendered by petitioner, were part of a bona fide consulting agreement whereby petitioner was to make himself available for financial consultation in the event the loans were obtained. At two successive trials, juries were unable to reach verdicts, and mistrials resulted. The government thereupon obtained a new indictment repeating the accusations in connection with the Entre Nous transaction but adding allegations of false loan applications in several similar transactions (which had been introduced as evidence in the first two trials) and a charge that petitioner had given false testimony at his second trial. After a third trial the jury reached a guilty verdict.[1]

REASONS FOR GRANTING THE WRIT

I.

The United States Court of Appeals for the Second Circuit has incorrectly expanded the scope of 18 U.S.C. §2(b) to a case properly brought under 18 U.S.C. §2(a).

A conviction under 18 U.S.C. §2(a) requires evidence that the defendant provided assistance to another person who was also guilty in that he acted with criminal intent. *United States v. Deutsch*, 451 F.2d 98, 118 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); *United States v. De La Motte*, 434 F.2d 289 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971). Put another way, a Section 2(a) conviction requires evidence that *two* persons, the aider and abettor, and the principal, are guilty of the crime charged.

---

1. The jury returned a verdict of guilty on Counts One, Two, Three, Six, Seven and Nine of the nine-count indictment. Counts Four, Five and Eight had been dismissed by the District Court at the close of the government's case.

A conviction under Section 2(b), on the other hand, requires different evidence than one under Section 2(a). Section 2(b) makes it unnecessary that the intermediary who commits the forbidden act have a criminal intent. *United States v. Kelner*, 534 F.2d 1020, 1023 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3115 (No. 76-153 Aug. 2, 1976). See also, *United States v. Kelley*, 395 F.2d 727, 729 (2d Cir. 1968), *cert. denied*, 393 U.S. 963 (1968). Section 2(a) requires evidence that two people, the aider and abettor, and the principal, have criminal intent; Section 2(b) only requires evidence that one person has criminal intent, the "causer".

The legislative intent of Section 2(b) is to "remove all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty . . ." Revisor's Note, 18 U.S.C. §2.

The purpose of Section 2(b) is to ensure a conviction under Section 2 where an "innocent actor" is "caused" to do wrong. Therefore, Section 2(b)'s application should be restricted to cases where an innocent person engages in conduct which is criminal. Otherwise Section 2(b) makes Section 2(a) redundant. Section 2(b) would also eliminate the requirement of Section 2(a) of evidence of the criminal intent of the intermediary. It appears, for these reasons, prior to this case, courts have found Section 2(b) liability only where a criminal act is committed by a person who is "caused" to act by the defendant, but who legally is innocent of any crime either (a) because he does not have knowledge of the facts, or (b) because he is so dominated and controlled by the defendant as to lack criminal responsibility for his conduct. *United States v. Berlin*, 472 F.2d 13, 14 (9th Cir. 1973); *United States v. Levine*, 457 F.2d 1186 (10 Cir. 1972); *King v. United States*, 364 F.2d 235 (5th Cir. 1966). See also, *United States v. Grasso*, 356 F. Supp. 814, 819 (E.D. Pa.), *aff'd.*, 485 F.2d 682 (3d Cir. 1973) where it was stated:

> "Defendant's conviction rests upon 18 U.S.C. section 2 . . . Although the conduct described in section 2(a) is apparently broad enough to overlap that described in section 2(b), it is clear that section 2, taken as a whole, proscribes two distinct forms of conduct: (1) participation in a criminal plan involving others who act with a criminal state of mind, and (2) the commission of a crime by the use of an innocent or irresponsible agent . . . ."

The United States Court of Appeals for the Second Circuit, failed to recognize this distinction. It stated:

> ". . . [A]ppellant advances the novel theory that, because the Government failed to prove that the persons who actually made the loan applications were innocent of the substantive crime with which Rapoport was charged and the Government even produced evidence tending to establish their guilt, Rapoport could not be prosecuted under section 2(b). Rapoport argues that 18 U.S.C. section 2(a) punishes as a principal one who assists a guilty accomplice in committing an offense."

The court went on to say that the guilt or innocence of the intermediary is irrelevant to the moral culpability of the defendant and held that 18 U.S.C. §2(b) was applicable irrespective of the guilt or innocence of the intermediary.

Thus, the Court of Appeals has expanded the scope of Section 2(b) as previously applied; their decision raises a most important question of federal law which has not been, but should be, settled by this Court, to wit: whether, and to what extent, 18 U.S.C. §2(b) overlaps 18 U.S.C. §2(a); whether one can be convicted under the "causing" statute where the intermediary acted with criminal volition?

II.

In his rebuttal summation, the prosecutor said that even the best lawyer money can buy could not save the defendant. This statement was so improper under the circumstances as to require a new trial.

After a fifteen minute recess, the prosecutor, at the opening of his rebuttal summation, stated, with regard to defense counsel Peter Fleming, of Curtis, Mallet-Prevost, Colt & Mosle:

> "Every defendant in this country is entitled to effective assistance of counsel, but even the very best counsel money can buy can't disentangle this man."

A mistrial was demanded immediately. The court denied the motion stating:

> "I am going to instruct that the reference to money be stricken, and I am counting on your good faith, ladies and gentlemen, when I strike something out, that you will put it out of your minds. *It is for that reason I am not* granting a mistrial, which I could if I didn't have faith in your ability that you would do it." (Emphasis added.)

Defense counsel Peter Fleming then stated:

> "I appreciate the compliment." (Appendix, *infra* at 33a).

As a general rule, the issuance of such a curative instruction will ordinarily be enough to correct what would otherwise constitute a prejudicial error. *United States v. Mallak*, 503 F.2d 971, 979 (2d. Cir. 1974), *cert. denied*, 420 U.S. 995 (1975);

United States v. La Frosciq, 485 F.2d 457, 459 (2d Cir. 1973). In the instant case, however, an exception should be made to the general rule. As in *Bruton v. United States*,391 U.S. 123 (1968), the remark herein was so prejudicial as to stick in the jury's mind despite any curative instruction.

The three trials involved very close issues of credibility. In the first two trials, Rapoport took the stand in his own defense, but in the third he was charged with two counts of perjury in the second trial! His credibility was underminded. Therefore, it was essential that Mr. Fleming, and the evidence he introduced, be believed in order for Rapoport to have a fair chance at acquittal. But then, after Rapoport's opportunity to testify was past, the prosecution blasted Rapoport's defense by impugning the integrity of his attorney, implying that Mr. Fleming was not to be trusted or believed; that his excellent services were bought in the same sense as Rapoport allegedly bought corrupt individuals to make, grant or apply for loans. The remark was unmistakably aimed at Mr. Fleming. Mr. Fleming's legal prowess and excellence are well-known to the public, as his name frequently appeared in the press when he represented former Attorney General John Mitchell in one of the Watergate-related cases. He has also represented other famous persons. Nor can it be doubted that the remark would stick in the jurors' minds. The central theme of the prosecution's case was "money". Rapoport was portrayed as a wealthy [2] individual accustomed to buying or bribing officials and executives. Implicit in the trial was the (mistaken) idea that Rapoport, a former SBA employee, was paying-off SBA personnel and personnel of various banks. Indeed, at the sentencing, Judge Brieant indicated, "The whole Small Business Administration must be rotten to the core . . ." The prosecution for their part appear to have gone to the extraordinary length to which they went to convict Rapoport[3] in

2. For example, the fact that Mr. Rapoport lived on exclusive Park Avenue was mentioned by virtually every witness; the substantial fees he received for his services; the payments of approximately $20,000 on his tax returns.

3. The government tried Rapoport three times. And, in the words of Judge Brieant, "They gave immunity out (to prosecution witnesses) like aspirin". Also, see *infra*, the illegalities in which the prosecution engaged.

order to learn from him the names of the corrupt officials and executives with whom he allegedly dealt. Thus, in this case the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings by condoning the District Court's refusal to grant a mistrial. Therefore, this Court should exercise its power of supervision to remedy the Second Circuit's error.

III.

The conviction for false swearing was based upon testimony which was immaterial when given during cross-examination at Rapoport's second trial.

At the second trial, Rapoport was charged only with having caused the filing of a false loan application by Entre Nous. Rapoport's central defense at that trial was his own testimony that the agreement with the president of Entre Nous, Pollak, was a bona fide consulting agreement. Therefore, his arrangement with Entre Nous was not required to be disclosed on the loan application and the statement on the application was not false. Rapoport and Pollak each sharply controverted the other's testimony as to the true nature of the agreement. Towards the end of his long cross-examination, Rapoport was asked about his connection with the previously unmentioned and unrelated loan application of American Medical Supply Company ("American Medical"). Rapoport denied being a finder for and receiving cash payment in connection with that loan. Rapoport was indicted for false swearing for this response, but the indictment was dismissed at the end of the government's case because his response consisted of a mere "negative nod". Finally, Rapoport was asked whether he had a consulting agreement with American Medical. His affirmative answer formed the basis for the false swearing conviction from which he appealed to the Court of Appeals.

Materiality is an essential element of the offense of false swearing under 18 U.S.C. §1623. *United States v. Mancuso*, 485 F.2d 275, 280 (2d Cir. 1973). Where a false swearing charge is based upon trial testimony, an expecially strict standard of materiality exists. See *United States v. Stone*, 429 F.2d 134, 140 (2d Cir. 1970); *United States v. Mancuso*, 485 F.2d 275, 281 n. 17 (2d Cir. 1973).

In order for a statement to be material, it must be relevant to some issue on trial. The Second Circuit held that the evidence was relevant because it showed inferentially that Rapoport intended the Entre Nous consulting agreement as a sham to disguise the true nature of his compensation (Appendix, *infra* at 6a). In so holding, the Second Circuit misconstrued the facts. Allegedly, Rapoport's *modus operandi* was to enter into sham consulting agreements with prospective borrowers.

Presumably, the false swearing as to the existence of a consulting agreement in the American Medical loan inferentially would be evidence of guilty knowledge or intent in the Entre Nous loan or evidence of a common plan or scheme. However, the facts of the American Medical loan indicate otherwise. In that loan, Rapoport's alleged *modus operandi* was not followed! The principals of American Medical testified that: Rapoport desired to be employed as a consultant, but they rejected his proposal; that, instead, they agreed with Rapoport to disguise his finder's fee by other means. They testified that, at the time of the application for the American Medical Loan, Rapoport did not even consider disguising his fee as a consulting agreement (Appendix, *infra* at 14a). It was, perhaps, from the large size of the fees, the lack of any specific services to be rendered, and the clandestine manner of payment that a criminal state of mind could be inferred in the American Medical loan (and this inference transferred to the Entre Nous loan); not from evidence of a sham consulting agreement. The fact that Rapoport allegedly lied as to the existence of a consulting agreement where none existed, is not relevant to show that he was lying as to the existence of consulting agreements with others. Thus, the Court

of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings by condoning the District Court's conviction for false swearing based on immaterial testimony. Therefore, this Court should exercise its power of supervision to remedy the Second Circuit's error.

IV.

The conviction on the Entre Nous loan should have been reversed and the count dismissed by reason of government misconduct amounting to participation in the crime alleged.

At the time the president of Entre Nous, Pollak, began cooperating with the government, the allegedly false loan application already had been filed with Manufacturers Hanover Trust. Thus, the alleged conspiracy and false statement offenses were complete.

The loan closed on July 18, 1974. However, before it was disbursed, the government served a grand jury subpoena on Manufacturers calling for the Entre Nous file. The bank informed Pollak that it would not disburse the loan in the face of the subpoena.

Pollak then asked Assistant United States Attorney George Wilson to help him secure the funds. Mr. Wilson called the bank and said the subpoena should not affect its business judgment in disbursing the loan. Mr. Wilson did not inform the bank of any of the alleged illegalities surrounding the loan. Had Manufacturers been told of the illegalities, it would not have disbursed the loan (Appendix, *infra* at 32a).

Eighty thousand dollars of the one hundred fifty thousand dollar loan was disbursed. The balance was escrowed pursuant to the loan agreement. On August 16, 1974, Pollak pleaded the Fifth Amendment before the grand jury. By late September 1974 Entre Nous had spent the eighty thousand dollars and Pollak asked the bank to invade the escrow account. It refused because

some portion of the eighty thousand dollars had been spent for unauthorized purposes and the seventy thousand dollars in escrow was for plant and machinery per the loan agreement. Pollak again called Mr. Wilson for help. Mr. Wilson called the SBA and the SBA prevailed upon the bank to release fifteen thousand dollars from the account. Again, the illegalities surrounding the loan were not disclosed to the bank. Pollak testified before the grand jury soon thereafter on November 3, 1974. The entire Entre Nous loan was in default by year end. There was no legitimate reason for the government to help Pollak secure the loan proceeds. The alleged crime was complete. The loan was closed. Tape recordings had been obtained. And, Rapoport had received a three thousand five hundred dollar check in partial payment of his fee.

The inference to be drawn from these facts is (that in this case replete with inferences of bribes and payoffs) the government's assistance to Pollak was in essence *a payment* for his testimony before the grand jury. The only purpose for the government's actions was to accommodate and benefit a "cooperating" prosecution witness. The government's actions, at the very least, amount to a fraud on the bank and on the federal taxpayers as 90% of the loan was guaranteed by the SBA. The government's conduct was also unbecoming an enforcement agency and placed the United States *in pari delicto* with Rapoport and Pollak. The government's participation in the crime alleged is at least as bad as that condemned in *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973).

In order to obtain and thereafter prove these new counts, the prosecution immunized at least eight witnesses, all of whom were immunized informally by the prosecutor without the advice and consent of the Attorney General. One of the witnesses was a CPA who received immunity even though he admitted paying bribes to a bank loan officer. During petitioner's sentencing, District Court Judge Brieant stated "They handed out immunity like aspirin."

CONCLUSION

The questions presented demand final review by this Court. They concern improprieties by the prosecution as well as an incorrect and overly broad construction of a criminal statute by the Court of Appeals.

The power of the United States Attorney's office to cause three trials, the power to immunize witnesses in exchange for favorable testimony, the power to obtain records from the IRS and the power to cause the SBA to release funds to a witness in exchange for favorable testimony, all these powers were exercised without the usual restraint in this case. The unrestricted exercise of such enormous power should not be tolerated since it prevents a fair trial.

Criminal statutes must be narrowly interpreted so as to afford a defendant ample notice of the charges against him. The Second Circuit's decision violates this principal of statutory construction. The circuits are divided as to the interpretation of the statutes in question herein. This division demands resolution and this request for review presents the ideal opportunity for this Court to act.

In the interests of justice, and for all the reasons and arguments stated herein, petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Jay W. Kaufmann

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS

United States Court of Appeals
For the Second Circuit

No. 201 September Term, 1976

Argued September 20, 1976 Decided Nov. 4, 1976

Docket No. 76-1291

United States of America,

Appellee,

v.

Jerome Rapoport,

Defendant-Appellant.

Before: Friendly, Hays and Timbers, *Circuit Judges.*

Appeal of a judgment of conviction of violation of 18 U.S.C. §§2, 1001, 1014, 1623, after a jury trial in the United States District Court for the Southern District of New York, Brieant, *J.*

Affirmed.

Peter Fleming, Jr., New York, N.Y. (Curtis, Mallet-Prevost, Colt & Mosle, New York, N.Y., John E. Sprizzo and Eliot Lauer, on the brief), for *Defendant-Appellant Rapoport*.

David A. Cutner, Assistant United States Attorney, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, New York, N.Y., Lawrence B. Pedowitz, Assistant United States Attorney, on the brief), *for Appellee.*

HAYS, *Circuit Judge:*

Appellant, Jerome Rapoport, appeals his conviction by the district court after having been found guilty by a jury of several counts of causing the filing of false applications for loans guaranteed by the Small Business Administration, 18 U.S.C. §§2(b), 1001, 1014, and one count of swearing falsely at a previous jury trial, 18 U.S.C. §1623. Appellant does not attack the sufficiency of the evidence supporting his conviction but nonetheless urges several grounds for reversal. We find no merit in Rapoport's arguments and accordingly we affirm the conviction.

Rapoport, the Government charged, had entered into agreements, disguised as consulting arrangements, with several financially hard-pressed businessmen, pursuant to which Rapoport was engaged to "find" Small Business Administration ("SBA") financing in exchange for contingent fees of ten percent of the loans sought. Rapoport advised his respective clients not to make disclosure of the finding agreements in their loan applications since Rapoport, a former SBA employee, knew the SBA would reject loan applications which revealed that finder's fees were being paid. Accordingly, Item 10 of the loan applications, where disclosure of compensation paid for "services of any nature whatever" in connection with the loans was to be made, was in all but one case answered incompletely

by the responding businessmen. In the one instance, the applicant, Allan Pollak of Entre Nous Graphics, Inc., answered "None".

The Government initially charged Rapoport only with respect to the Entre Nous transaction. Rapoport, however, steadfastly maintained his innocence, testifying at trial in his own behalf that the fee arrangements, rather than being compensation for "finding" services to be rendered by Rapoport, were part of a *bona fide* consulting agreement whereby Rapoport was to make himself available for financial consultation in the event the loans were obtained. At two successive trials juries were unable to reach verdicts, and mistrials resulted. The Government thereupon obtained a new indictment, repeating the accusations in connection with the Entre Nous transaction but adding allegations of false loan applications in several similar transactions and a charge that Rapoport had given false testimony at his second trial. After a third trial the jury reached a guilty verdict[1] and Rapoport now appeals.

I

Rapoport argues that prosecutorial misconduct, in the form of an allegedly improper remark in the Government's rebuttal summation, warrants a new trial. In his rebuttal summation, the prosecuting attorney stated:

> "Every defendant in this country is entitled to the effective assistance of counsel, but even the very best counsel money can buy can't disentangle this man —."

Rapoport contends that this remark "tore directly at the heart of the adversary system,"[2] and was highly prejudicial insofar as a central theme of the trial was "money".[3] More realistically

interpreted, however, the prosecutor's remark was simply a statement that even with the most effective legal assistance, Rapoport could not overcome the overwhelming proof of his guilt. In any event, any possible prejudice to Rapoport which might have been occasioned by the prosecutor's remark was prevented by a prompt cautionary instruction from the trial judge to the jury not to pay any heed to the "money can buy" remark. In view of the cautionary instruction, a remote if not altogether fanciful possibility of prejudice from the prosecutor's remark cannot force a new trial. *See United States v. Mallah,* 503 F.2d 971, 978-79 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975); *United States v. LaFroscia,* 485 F.2d 457, 459 (2d Cir. 1973).[4]

II

Rapoport argues that his false testimony at the second Entre Nous trial was immaterial when given and thus could not have been the basis for a conviction of having made false statements at the jury trial in violation of 18 U.S.C. §1623.[5] We disagree that the false statements were immaterial to the second trial.

At the second trial, Rapoport was charged only with having caused the filing of a false loan application in connection with the Entre Nous loan. Rapoport's central defense at that trial was his own testimony that the agreement with Pollak, the president of Entre Nous, was a *bona fide* consulting agreement and therefore the statement on the loan application was not false. Rapoport and Pollak each sharply controverted the other's testimony as to the true nature of the agreement. On cross-examination of Rapoport, the Government inquired whether Rapoport had acted as a finder in connection with an SBA-guaranteed loan to the American Medical Products Company. Rapoport answered the question in the negative. Rapoport was then asked whether he had received cash payments of thirty thousand dollars in connection with the American Medical loan.

Rapoport apparently answered that he had not.[6] Finally, Rapoport was asked whether he had a consulting agreement with American Medical. His affirmative answer formed the basis for the false swearing conviction from which he now appeals.

Rapoport now argues that the series of questions and responses concerning the American Medical loan was not material to the second trial. Rapoport correctly states that the applicable standard of materiality is whether Rapoport's testimony "was capable of influencing the jury on the issue before it," *United States v. Gugliaro,* 501 F.2d 68, 71 (2d Cir. 1974), or "would have been of sufficient probative importance . . . so that, as a minimum, further fruitful investigation would have occurred," *United States v. Freedman,* 445 F.2d 1220, 1227 (2d Cir. 1971). But Rapoport argues that the testimony in issue was not properly admissible into evidence at the second trial because it merely showed "defendant's propensity to engage in criminal conduct of the kind under indictment and on trial."[7]

Assuming, *arguendo,* that Rapoport is correct in his premise that inadmissible prior crimes evidence is *per se* immaterial under the standard applicable to convictions for false swearing,[8] we nonetheless believe that the American Medical testimony was relevant and admissible at the second Entre Nous trial. The intent of the parties with respect to the Entre Nous transaction was highly controverted, Pollak contending that the agreement was to compensate Rapoport as a finder and Rapoport himself testifying that the agreement was that he be paid for financial consulting services other than finding the SBA-guaranteed loan. Rapoport's own state of mind was therefore squarely in issue. By questioning Rapoport concerning the American Medical loan and the related cash payments, the Government was clearly seeking to establish that Rapoport had a guilty state of mind in connection with the American Medical Products loan. Such proof of a prior crime was in turn relevant

to show that Rapoport had the requisite criminal intent in connection with the Entre Nous loan as well as the American Medical loan, that is, to show that he intended the Entre Nous "consulting" agreement as a claim to disguise the true nature of his compensation. Since there is no reason now to disturb the discretionary determination by the district court at the second trial that any possible prejudice occasioned by the American Medical evidence was outweighed by its probative effect, the evidence was properly admitted into evidence though it tended to establish a similar crime. Fed. R. Evidence 403, 404(b); *United States v. Santiago,* 528 F.2d 1130, 1134 (2d Cir.), *cert. denied,* 44 U.S.L.W. 3659 (1976). Since Rapoport's testimony was material and admissible when given, it provided an adequate basis for his conviction of false swearing in violation of 18 U.S.C. §1623.

III

The Government did not charge that Rapoport himself made the false statements in the loan applications. Rather, the Government charged that Rapoport was liable as a principal because he "willfully cause[d] an act to be done which if directly performed by him or another would be an offense against the United States . . ." 18 U.S.C. §2(b). Rapoport does not contend that the evidence was not sufficient to establish that he caused the loan applicants to omit reference to him in their applications. Rather, appellant advances the *novel* theory that, because the Government failed to prove that the persons who actually made the loan applications were innocent of the substantive crime with which Rapoport was charged and the Government even produced evidence tending to establish their guilt, Rapoport could not be prosecuted under section 2(b). Rapoport argues that 18 U.S.C. §2(a) punishes as a principal one who assists a *guilty* accomplice in committing an offense. He contends that if section 2(b) were also interpreted to include the situation where the accomplice was guilty, the statute would be redundant, a circumstance Congress could not have intended.

Rapoport's argument is simply untenable. Section 2(b) merely "removes all *doubt* that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty. . . ." Revisor's Note, 18 U.S.C. §2 (emphasis supplied). The statute makes it "*unnecessary* that the intermediary who commits the forbidden act have a criminal intent." *United States v. Kelner,* 534 F.2d 1020, 1023 (2d Cir.), *petition for cert. filed,* 45 U.S.L.W. 3115 (No. 76-153, Aug. 2, 1976) (citations omitted) (emphasis supplied). *See also United States v. Kelley,* 395 F.2d 727, 729 (2d Cir.), *cert. denied,* 393 U.S. 963 (1968). Though it removes any requirement that the intermediary be guilty, section 2(b) contains no express requirement that the intermediary actually be innocent.

While Rapoport suggests that logic supports the incorporation of such a requirement by construction, the opposite is true. It may frequently be a matter of doubt whether the intermediary is guilty or innocent of the crime with which the defendant is charged pursuant to section 2(b). Since the guilt or innocence of the intermediary is irrelevant to the moral culpability of the defendant, the sound administration of criminal justice would not be served by requiring judges to determine the validity of the myriad personal defenses and immunities which the intermediary might possess.[9] Moreover, the construction advocated by appellant would force upon prosecutors a hazardous election between proving a defendant's guilt by means of section 2(a) which under appellant's theory would require that the jury be satisfied of the intermediary's guilt, or by means of section 2(b) which would require satisfaction of the jury that the intermediary was innocent. We believe that Congress recognized as much when it enacted section 2(b) and accordingly we reject Rapoport's contention.

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Finally, Rapoport argues that no "false" statements were made within the meaning of 18 U.S.C. §§1001, 1014 since all but one of the applicants answered Item 10 incompletely, for example, by listing the name of an accountant on retainer. The argument has no merit, especially in light of instructions accompanying the applications requiring full disclosure of the names of, and the amount of compensation being paid to, persons engaged to provide "services of any nature whatever" in connection with the loan applications. By instructing the several applicants to answer Item 10 incompletely, Rapoport must be taken to have caused the applicants affirmatively to misrepresent that complete disclosure had been made. *See United States v. Williams*, 470 F.2d 915 (2d Cir. 1972) (omission of income from tax return).[10]

We have considered carefully appellant's other claims of error and find that they do not merit further discussion.

Affirmed.

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Footnotes

1. The jury returned a verdict of guilty on Counts One, Two, Three, Six, Seven and Nine of the nine-count indictment. Counts Four, Five and Eight had been dismissed by the district court at the close of the Government's case.

2. Appellant's Brief, at 11.

3. *Id.* at 10.

4. Rapoport makes other charges of prosecutorial misconduct. The charges are groundless and do not warrant out discussion.

5. *United States v. Mancuso*, 485 F.2d 275, 280 (2d Cir. 1973); *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970).

6. Rapoport apparently "nodded negatively" in response to the prosecutor's question. Count Eight of the indictment, which was based upon this response and a response to an improperly phrased question, was dismissed by the district court.

7. Appellant's Brief, at 17.

8. It would be difficult indeed for Rapoport to contend that his testimony concerning his dealings with American Medical was incapable of influencing the jury at the second trial — the relevant standard of materiality under 18 U.S.C. §1623. The thrust of Rapoport's argument that the American Medical testimony was not material is instead directed elsewhere, at the question whether the evidence was admissible though it was evidence of a prior crime. Rapoport thereby substitutes the relatively stricter standard of Fed. R. Evidence 404(b) for the standard this Court has formulated in relation to section 1623. Arguably, the more lenient section 1623 standard is the more appropriate,

though we have assumed the contrary for purposes of the discussion *infra*. A witness at a trial should not be given license to employ false statements which might influence the jury merely because the parties have failed to object to the testimony or the judge erroneously determined that it was admissible.

9. For example, in *United States v. Kelner, supra*, the defendant had called a news conference to announce his organization's intention to assassinate a visiting foreign leader. This Court rejected defendant's argument that the television station which actually broadcast the threat, rather than he, had "caused" the transmission. In so doing, the Court noted that the criminality of the defendant's act was unaffected by any possible First Amendment right of the station to transmit the threat in interstate commerce — the conduct forbidden by the statute, 18 U.S.C. §875(c) — and therefore refused to consider that issue, 534 F.2d at 1023 n.3. Rapoport's suggested construction of section 2(b), however, would have necessitated determination of the First Amendment question in *Kelner* though the activities of the defendant himself were without First Amendment protection.

10. Rapoport attempts to find support for his argument in our decision in *United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963). In *Diogo*, defendants were charged with falsely representing to immigration authorities, in violation of 18 U.S.C. §§1001 and 1546, that they were married. This Court reversed the convictions because the representations were literally accurate under the New York matrimonial law deemed to be applicable, even though the defendants subjectively intended their marriages to be sham. *Diogo* is distinguished from the instant case because here no contention can fruitfully be made that the applications were literally accurate. Indeed, Rapoport apparently concedes they were incomplete.

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

* * *

Marshall Samarel—for Government—Direct

Q. Did you ever see Mr. Rapoport again after that meeting? A. No, I did not.

Q. Did you enter into a consulting agreement with Mr. Rapoport at that meeting? A. I myself or—

Q. Yes, you yourself or the company. A. No.

The Court: I think it would be worthwhile if he identified the people in addition to himself and the (882) defendant who were present. Who is Mr. Raymond?

The Witness: He is chairman of the board of American Metal Products Corporation.

The Court: And Mr. Seymour?

The Witness: He is our accountant.

The Court: And Mr. Schwartz?

The Witness: President of American Metal Products Corporation.

Q. Who is Mr. Jenkins? A. Jenkins, he is a banker and I believed he worked in the SBA department at Manufacturers Hanover.

Marshall Samarel—for Government—Direct

Q. Would you describe Mr. Schwartz' position in the company? What does he do as president? A. As president his main objective is—he is really the chief marketeer of the company, and he lines up doctors and hospitals for possible sales or leasing of our machines and equipment into the hospitals.

Q. He is your top salesman, is that fair to say? A. Yes, he is.

Q. Did you ever enter into a consulting agreement with Mr. Rapoport? A. No, we did not.

* * *

Joseph J. Raymond—for Government—Direct

Q. Would you tell us what you did and what you said and what Mr. Rapoport said? A. Well, it was a by chance meeting. I was up there delivering $4,000 to Mr. Seymour for payment on this (888) loan, and I by chance met Mr. Rapoport who had at that time asked me for some more money—

The Court: Wait, wait. You said you were delivering $4,000 to Seymour as payment on the loan?

The Witness: Yes.

The Court: What were you giving him $4,000 as payment on the loan for?

The Witness: To Mr. Seymour?

The Court: Yes.

Joseph J. Raymond—for Government—Direct

The Witness: I assumed it was being delivered to Mr.—

The Court: I don't care what you assumed. What were you giving Mr. Seymour $4,000 for? This is cash, I gather?

The Witness: Yes, it was.

The Court: What were you giving Seymour $4,000 for? You said this was a fee for him?

The Witness: No, it was a fee for Mr. Rapoport.

The Court: Did you give the money to Mr. Rapoport?

The Witness: No, I didn't.

The Court: Was Mr. Rapoport in the room when you gave it to Mr. Seymour?

The Witness: No, he wasn't.

The Court: Did you have a conversation with Mr. (889) Rapoport while you were there?

The Witness: Yes, I did.

The Court: What was that conversation?

The Witness: The conversation was that Mr. Rapoport felt that he wanted some more money based upon our not giving him an equity position in American Metal Products.

The Court: What did he say? I want to know what he said, what he said to you and what you said to him.

The Witness: He felt that—

The Court: Not he felt. What did he say to you?

The Witness: I am saying what he said. He said, "I felt I have done a very good job for you in obtaining the SBA loan, and I thought that I gave a lot away by not taking a total equity position and that I feel that I should have some more money."

I sort of objected to it and told him that I didn't feel he should have any more money than was given.

The Court: All right.

By Mr. Kenney:

Q. After that meeting did you see Mr. Rapoport again? A. Yes, I did.

Q. When was the next time you saw him? A. It was at the Metropolis Country Club in White (890) Plains, probably about another three weeks after that.

Q. Was there anyone else present when you met with Mr. Rapoport on that occasion? A. Yes, Mr. Seymour.

Q. Would you tell us what you did and what you and Mr. Rapoport said on that occasion? A. Well, I delivered $11,000 in cash to Mr. Rapoport at that time and I gave it to him, and at that particular time the conversation was based on additional finances and if we needed some additional finances he would be glad to work with us as to trying to held [sic] us obtain some more money, if needed.

Q. What did you say to Mr. Rapoport? A. I told him that I would contact him if needed, and that it sounded like a good idea.

Q. Subsequent to that did you meet with Mr. Rapoport again? A. No.

Q. Did you give any money to Mr. Seymour? A. No. No more than what I have said.

Q. Did anyone else in your company give any money to Mr. Seymour? A. Yes.

Q. How much money was given Mr. Seymour? (891) A. A total of—between Mr. Rapoport and Mr. Seymour, a total of $31,600, I think, was given, and this was the number we filed on our 1099 form.

Q. Where did that money come from? A. The money came from American Metal Products.

Q. Any particular income to American Metal Products? A. We had—we didn't have enough income for it all to come from there. It had to come from the SBA loan.

Q. Would you look at Government's Exhibit 31, please.

Does Mr. Rapoport's name appear any place there? A. No, sir.

Joseph J. Raymond—for Government—Direct

Q. What is the status of the SBA loan at this time? A. Current.

Q. Have you been told by the Government that you would not be prosecuted for making a false statement to the Government or to the SBA or to the bank? A. I don't understand your question.

Q. Do you expect to be prosecuted for filing a false statement? A. No.

* * *

Allan Pollak—for Government—Cross

Q. And that happened at a conversation between you and Mr. Rubin of the SBA? A. No, not exactly, Mr. Fleming.

Q. Did you find out that the loan had been cut from 185 requested on the application to 150 when you met with Mr. Rubin at the SBA? (498) A. Yes, sir, I did.

Q. Was Mr. Rapoport present at that meeting? A. No, sir.

Q. Then, as a matter of fact, Mr. Rubin would not even allow you to take $150,000 without any limitation, would he? A. He would not let me take the $150,000 in the way, the loan was structured.

Q. Mr. Rubin of the SBA provided that you could receive only $80,000 on disbursements, isn't that correct? A. Yes, sir.

Q. And that 70,000 of the $150,000 would be kept in escrow? A. For machinery and equipment, yes.

Allan Pollak—for Government—Cross

Q. Kept under control for machinery and equipment only? A. Yes, sir.

* * *

(499) Q. You got the $80,000 towards the end of July, is that right? A. No, sir, we got it in August.

Q. You got it in August? A. Yes.

Q. And you had it spent by September, is that right? A. Near that, yes, sir.

Q. Did you ever spend any of the additional 70,000? A. Yes.

Q. How did you come to spend that? Did you spend all of the additional 70? A. No.

Q. It was not free for you to spend, was it? A. No.

Q. You had to get permission to spend some part of it, did you not? A. Yes.

Q. And you went to Manufacturers Hanover Trust Company and they refused you permission, did they not? A. Yes.

Q. And one of the reasons they refused you permission was because you had spent some of the $80,000 to (500) pay people who had not been reflected in your application? A. I don't know.

Q. And when the Manufacturers Hanover Trust Company refused to allow you to invade the escrow fund you went to Assistant United States Attorney George Wilson, did you not? A. Yes.

Allan Pollak—for Government—Cross

Q. And you asked him to check it out, did you not? A. Yes.

Q. And he spoke to the SBA; did he tell you that? A. Yes.

Q. And then you went to speak to the SBA? A. Yes.

Q. You spoke to Mr. Dean? A. Yes, sir.

Q. And you pled your case to Mr. Dean? A. Yes.

Q. And Mr. Dean had Mr. Mauch of the SBA to talk to the bank? A. I don't know that either.

Q. Did Mr. Dean tell you he did that? A. I don't remember, sir.

Q. In any event, the bank changed its mind at the request of the SBA?

(501) Mr. Cutner: If he knows.

A. I don't know.

The Court: Is there any argument about what they did? Isn't this a big waste of time? Aren't you prepared to concede they changed their mind at the request of somebody?

Mr. Cutner: He is asking what Mr. Pollak knows, your Honor.

The Court: Oh, he is trying to get at the underlying facts.

All right, frame the next question.

Allan Pollak—for Government—Cross

By Mr. Fleming:

Q. Did the bank change its mind? A. Yes.

Q. And was this after you had gone to the SBA? A. Yes.

Q. And after you had complained to Mr. Wilson? A. Yes.

Q. And then you got $15,000 more? A. Yes.

Q. And the bank made you put up more of your father's securities? A. Yes.

Q. And then you testified in the grand jury, isn't (502) that right? A. Well, Mr. Fleming, I don't remember if it was before or after the testimony at the grand jury.

Q. Well, on August 13 you told Mr. Rapoport you received a grand jury subpoena, am I correct? A. Yes, sir.

Q. Did you appear before the grand jury pursuant to that subpoena? A. I got two subpoenas, Mr. Fleming, I am sorry, I don't remember which one I appeared for.

Q. Did you appear before the grand jury shortly after your conversation with Mr. Rapoport on August 13? A. I don't remember, sir. I am sure that the record will show when I appeared in the grand jury.

Q. Did you ever go in the grand jury and take the Fifth Amendment? A. Yes.

Q. And that was the first time in the grand jury? A. Yes.

Q. And was that after you had spoken to Mr. Rapoport on August 13? A. Yes.

Q. And was it after you took the Fifth Amendment in the grand jury that you asked for the additional $15,000? (503) A. I don't remember that Mr. Fleming. I don't remember whether the dates—what dates you are asking.

Mr. Fleming: May I have that marked, please. (Defendant's Exhibit I marked for identification.)

Q. Mr. Pollak, I show you Defendant's Exhibit I for identification. Does that refresh your recollection as to the date upon which you appeared before the grand jury and did not take the Fifth Amendment? A. Yes, sir.

Q. And that is your second appearance before the grand jury, isn't that right? A. Yes.

Q. Am I correct that that was on November 1, 1974? A. Yes, sir.

Q. And am I correct that that was after you had asked Mr. Wilson and the SBA to intervene with the Manufacturers Hanover Trust Company to get you $15,000 out of the escrow account? A. Yes, sir.

(504) Q. Did you testify in your direct examination, Mr.—do you have the entree [sic] into his loan application?

Mr. Cutner: Yes.

Q. I show you Government's Exhibit 1, Mr. Pollak. I direct your attention to paragraph 10 that's been called the compensation paragraph where the word "none" is inserted. Do you have that? A. Yes, sir.

Q. Did you testify on your direct examination that you had discussed that paragraph with Mr. Rapoport in April or early May of 1974? A. Yes, sir.

The Court: Just ask him if he discussed it in April or early May. Don't ask him the underlying facts. Just ask him: Did you discuss it then?

The Witness: Yes, sir.

Q. I show you your grand jury testimony, Exhibit I. Would you look at it and tell me, Mr. Pollak, if at any place in that grand jury testimony you ever say that you discussed paragraph 10 with Mr. Rapoport in April or May, 1974?

The Witness: I have to read this, your Honor. I haven't seen it in six months.

(505) The Court: Mr. Cutner, is it in there or isn't it? You are going to make this jury and court sit there while he reads this, are you?

Mr. Cutner: I understood Mr. Fleming was going to ask me in advance if he wants a concession on something. I just don't remember, Judge.

The Court: Take a look at it, please.

Mr. Cutner: I would be happy to. If I had an opportunity in advance to look it over—

The Court: Go ahead and read it, Mr. Pollak.

(Pause.)

The Court: Do you make a representation to the court it isn't in there, Mr. Fleming?

Mr. Fleming: Yes, sir.

The Court: I will take your representation. Let's go on with the trial.

* * *

(513) Q. Let me show you Exhibit 1 again, which is the loan application. That was signed by you on or about April 29, 1974? A. A little later, yes.

Q. And then submitted to the bank? A. I don't know where it was submitted, Mr. Fleming. It was sent back to Mr. Rapoport.

Q. Let me ask you: was it part of the martials submitted to the bank in support of the application for the loan? A. Yes, sir.

Q. And it been [sic] submitted to the bank before June 6, 1974, when you went into the United States Attorney's office? A. I don't know, Mr. Fleming. I guess so, yes.

Q. Do you remember telling Mr. George Wilson, assistant United States attorney, on June 6, 1974 that all the papers submitted in support of the loan were in accordance with the law? A. Yes.

Q. And this was one of those papers, isn't that right? (514) A. Yes, sir.

Q. And you went in to Mr. Wilson to cooperate with him? A. Yes.

Q. And June 6th was, according to your testimony, after Mr. Rapoport had told you that "none" was a false statement? A. Yes.

Q. And you told Mr. Wilson all the papers were submitted in accordance with law? A. Yes.

Q. You also told Mr. Wilson on June 6, 1974 that Mr. Rapoport really hadn't done very much, didn't you? A. Yes, sir.

Q. In fact, you said to Mr. Wilson you could have done the whole thing yourself? A. Yes, sir.

Q. And you complained to Mr. Wilson that you weren't getting any action? A. I did.

Q. And you complained to Mr. Wilson that you weren't getting your loan? A. I don't know that I said I wasn't getting (515) the loan. I said I wasn't getting action.

Q. The same thing? The action you were looking for was the loan, wasn't it? A. Yes, sir.

Q. And that's when you agreed to wear the tape recorder? A. Yes.

Q. And that's when Mr. Wilson told you you wouldn't be prosecuted? A. Yes, sir.

* * *

(519) Q. Now, Mr. Pollak, in July did you receive a call from the bank—that is, Manufacturers Hanover Trust Company—telling you that the Manufacturers Hanover Trust Company was not going to disburse the loan? A. Yes.

Allan Pollak—for Government—Cross

Q. And did they tell you that they had received a grand jury subpoena in connection with the file on your loan? A. Yes.

Q. And did they give you that reason for the reason why they were not going to disburse the funds? (520) A. Yes.

Q. And did you call Mr. George Wilson, the assistant United States attorney? A. Yes, sir.

Q. And did you complain to him about the decision of the Manufacturers Hanover Trust Company? A. Yes.

Q. And did you ask the assistant United States attorney to call the Manufacturers Hanover Trust Company and see if he could get them to disburse the money? A. Yes, sir, I did.

Q. And did you thereafter receive the money? A. In part.

Q. You received $80,000? A. Over a period of time, yes.

Q. That's all you were entitled to, wasn't it, $80,000? A. No, sir.

Q. You received that? A. Yes.

* * *

Allan Pollak—for Government—Recross

(538) *Recross Examination by Mr. Fleming:*

(538) Q. The grand jury testimony from which Mr. Cutner read was your second appearance on November 1st, (539) is that right? A. Yes, sir.

Q. The first time in you took the Fifth Amendment? A. Yes, sir.

Allan Pollak—for Government—Recross

Q. And then you got $15,000 out of the escrow account—

Mr. Cutner: I object. It's been gone over.

The Court: The time frame in which it occurred may be made clear.

Q. You got $15,000 out of the escrow account? A. Yes.

Q. And then you went before the grand jury on November 1st? A. Yes, sir.

(583) The Court: Really, that's the key to the whole case, a vast amount of money for doing practically nothing. If it weren't for that the whole case would be thrown out.

* * *

August McCarthy—for Defendant—Direct

(960) Q. Now, did you subsequently receive approval, an SBA guarantee on the loan? A. Eventually but in a lesser amount.

Q. Will you describe the approval. Can you recall the approval that you got? A. The eventual approval was, I believe, $150,000, and it came after an initial decline of that proposal as presented.

Q. Do you recall that there were any restrictions with regard to the total sum of the $150,000? A. There were. There were restrictions that had to do with funds to be set aside for the purchase of certain (961) specific items of equipment, primarily for the equipping of a printing plant for the card business here in New York City.

Q. Were those funds held in escrow for that purpose? A. Yes. There were approximately $68,000 held in escrow, and the balance of the $150,000 was disbursed for general working capital purposes to the business at the time of the loan closing.

Q. Now, 150 less 68 is about $82,000, is that right? A. Yes. I may be off a few thousand dollars on these figures.

Q. Before the 80,000-some-odd dollars were disbursed to Entre Nous Corporation, did the bank receive a subpoena from the office of the United States Attorney? A. Yes, we did.

Q. Did you contact Mr. Pollak? A. I contacted Mr. Pollak after receiving a subpoena calling for the bank's records on Entre Nous Graphics. I told Mr. Pollak that until we had knowledge of what this subpoena represented, that we would not close on the loan which at that time had been approved and had a closing schedule for, I believe, the week we received the (962) subpoena.

Q. After informing Mr. Pollak of this were you present when there was a telephone conversation between counsel for the bank and an Assistant United States Attorney named George Wilson? A. I was present at the telephone conversation, and as I understood it, I was talking to Mr. Wilson.

Q. And what was the substance of that conversation, as you recall it? A. The substance of the conversation was that Mr. Wilson told us that the subpoena that we received for the Entre Nous Graphics bank records was not in any way to be construed a detrimental thing for Entre Nous's credit worthiness, and that there was no reason that he could see that should forestall the bank from closing and disbursing the loan.

Q. Am I correct that the loan was closed and a portion was disbursed and 68,000-some-odd dollars were kept in escrow? A. That is correct.

Q. Now, did Allan Pollak come back to see you about the end of September, 1974, about two months after the loan was disbursed? A. He initially called me, or perhaps I called—(963) no, I called him and he returned my call. He was then in Chicago. He returned my call.

My call to him was that he had missed the monthly interest instalment on the loan, and that there was no money in the account with which to take the interest, and that the next month's interest instalment was roughly two weeks away. It had first been brought to my attention that he had missed the month's interest about two weeks after the payment was due.

I called him then and asked him why he had not made the interest payments.

He indicated that he had no funds with which to make the interest payments and asked that I disburse enough funds out of the money held in escrow to meet the arrears interest payment.

Since the money held in escrow was held in terms of approximately so much money for escrow for the machinery and equipment, we had the leeway of disbursing small amounts of those funds without going to the SBA for approval to do so.

Normally our leeway would be 10 per cent of the money in the escrow account.

The discussion with Mr. Pollak led me to understand that he not only didn't have enough money to make the (964) arrears interest payments but that he would not have enough money from collection of receivables to make the coming interest

payment; and so I agreed with Mr. Pollak on the phone that I would disburse approximately $3,000 from the escrow funds to meet those two interest payments, with the understanding that Mr. Pollak would come into the bank the following week and discuss with me what seemed to be a problem that none of us had envisioned, that being the company having no funds. And then he did come in the following week.

Q. Did he speak with you? A. And he did speak with me the following week, and he brought with him financial statements and projections and lists of items for which the funds had been spent up to now, and that sort of information, together with a proposal that we disburse an additional $15,000 out of the escrow for working capital.

We discussed this at length, and I told him that I did not see any merit in the bank's doing so because I felt that with the amount of money that had been thus disbursed to that time, without any acquisition of assets of value, in my opinion, that it was only a matter of throwing good money after bad, and that the escrow funds, we could apply them to the balance of the loan payment, (965) or to the balance of the principal of the loan, and keep both the bank and the SBA from suffering any loss on the loan.

Q. So you refused? A. I refused.

He asked me to reconsider.

I told him that I would give it some more thought—I believe he was in on a Friday— that I would give it some more thought, that I would think about it over the weekend and call him the following Monday.

I did so.

I told him that the answer was no.

He asked if there was any appeal to this answer, and I told him that—it may be that he suggested an appeal to the SBA, and I told him he was free to go to the SBA and appeal it if he wanted to, but I told him I felt they would go along with the bank's decision in this matter since that was their normal procedure.

Q. Did you subsequently receive a call from someone at the Small Business Administration? A. The following week I was on vacation; Mr. Pollak came in with further information and asked that someone from the bank accompany him to the SBA. He had already been told that no one would; that if he wanted to go to the SBA (966) he would have to do it on his own.

Apparently he did so, because—

Q. Well, you don't know what he did. Did you receive a call from the SBA? A. The week that I—I believe it was the week that I got back from vacation I did receive a call from the SBA.

Q. Do you recall who called you? A. There were a series of telephone conversations with the SBA.

If you will give me a moment—I am trying to think of how the sequence occurred—

> The Court: I think we are getting a little afield here. The Court understands from Mr. Pollak's testimony that he ultimately did receive the 15,000; isn't that right?
>
> Mr. Fleming: Yes, that's right.
>
> The Court: Do you dispute the truth of that?

Mr. Fleming: No. If it is stipulated I can just state how it happened.

The Court: The only testimony in the case shows that he got the money.

Mr. Fleming: No, your Honor. The testimony by Mr. Dean, if you will recall, the second witness from the SBA—

The Court: All right, frame another question. (967) He didn't get the 15,000?

Mr. Fleming: No, how he got the 15,000.

The Court: All right, ask Mr. McCarthy another question.

By Mr. Fleming:

Q. Did you receive a call about the 15,000 from someone at SBA? A. Yes.

Q. What, in substance, did they ask? A. In substance we were asked to reconsider our decision on the $15,000 out of the escrow fund.

Q. What did you tell them? A. I told them that we would not agree to releasing $15,000 from the escrow fund—

Q. Is that the end of that conversation? A. Well, the request was that we reconsider, and in the conversation my question to the man at the SBA was: "Why are you asking us to do this since this is not a good credit decision?"

And the answer was, from the man at the SBA, that they had been asked to reconsider this by someone from the U.S. Attorney's Office.

Q. Did you, Mr. McCarthy, during that phone conversation agree to the SBA's request? (968) A. No.

I asked our Legal Department whether this should have any bearing on our decision, and was told that it was a credit decision; and I told them no again.

We received a subsequent phone call. Mr. Pollak was with Mr. Mauch, you will recall, then, and I was asked if there was any way that we could reconsider it, and I said if he could find an additional $15,000 of collateral that we would advance $15,000 if it was replaced by an equivalent dollar amount of collateral.

Mr. Mauch said that Mr. Pollak at that conversation with him had agreed that he would try and do this, and subsequently we did receive additional collateral of more than $15,000, and subsequently we thereafter did release $15,000 out of the escrow funds.

Q. Am I correct the loan was in default in about a month and a half? A. Yes.

Q. Now, Mr. McCarthy, you approved the original loan application at $185,000, is that correct? A. I did not—are you speaking about me or the bank?

Q. The bank. A. The bank had submitted the $185,000 loan request,

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(990) *Redirect Examination by Mr. Fleming:*

Q. Mr. McCarthy, when Mr. Wilson, the Assistant United States Attorney, called in July to say that the grand jury subpoena served on the bank in connection with the Entre Nous loan did not have to affect your judgment on this disbursement, did Mr. Wilson tell you that it was his suspicion that Mr. Pollak had agreed to pay Mr. Rapoport a fee of 10 per cent of the loan for obtaining the loan? A. No, sir.

Q. And if Mr. Wilson had told that that was his suspicion, that is, that Mr. Pollak had agreed to pay (991) Rapoport 10 per cent of the loan for obtaining the loan, would you have disbursed the proceeds? A. No, sir.

* * *

(1030) The Court: Motion denied.

As far as the last count, I think it was directly material as to whether this defendant in truth and

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GOVERNMENT'S REBUTTAL SUMMATION

(1130) Ladies and gentlemen, this is rebuttal summation. I am supposed to confine my remarks responding to the arguments Mr. Fleming made, and I will try very carefully to do that, your Honor.

Every defendant in this country is entitled to the effective assistance of counsel, but even the very best counsel money can buy can't disentangle this man—

Mr. Fleming: I object to the statement and move for a mistrial.

The Court: I will deny the motion. I (1131) think you have to remember attorneys have a duty to represent defendants to the best of their ability, and all defendants, whether they can afford to pay or not, are entitled to the best legal representation that can be obtained.

I am going to instruct that the reference to money be stricken, and I am counting on your good faith, ladies and gentlemen, when I strike something out, that you will put it out of your minds. It is for that reason I am not granting a mistrial, which I could if I didn't have faith in your ability that you would do it.

Mr. Fleming: I appreciate the compliment.

The Court: Let's get down to the case and proceed.

Mr. Cutner: You may find that nothing can pull Mr. Rapoport out of the hopeless tangle of lies that he has proven for himself.

Mr. Fleming has suggested some things to you. I suggest to you that he can't have it both ways. He says why doesn't the government talk about the government's witnesses, why do we spend all the time talking about Mr. Rapoport?

(1132) There is a very good reason for that, as Mr. Fleming himself said. The issue here is what did Mr. Rapoport think, what is his intention, what did he understand the agreement to be? I suggest to you it is perfectly sensible to talk about what this man says when the issue at hand is what was his understanding, so you can't have it both ways.

Government's Rebuttal Summation

Now, Mr. Fleming likes to talk about Allan Pollak, and again you can't have it both ways. First he lands on Pollak with about 25 body blows and then he tells you Pollak ought to behave like a professional government agent, experienced at conducting investigations.

* * *

(1233) The Court: I already expressed myself about the immunity but that is something which the executive branches of the government have the power to do, and because of all the strictures placed upon the detection and the prosecution of crime, it is often necessary to use informers. Here they handed out immunity like aspirin.

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Supreme Court, U. S.
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No. 76-921

In the Supreme Court of the United States

OCTOBER TERM, 1976

JEROME RAPOPORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on three counts of causing the making of a false loan application to a federally insured bank, in violation of 18 U.S.C. 1014 and 2(b), two counts of causing the making of false statements in loan applications to the Small Business Administration, in violation of 18 U.S.C. 1001 and 2(b), and one count of making a false sworn declaration, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of two years' imprisonment on the loan counts and a consecutive term of one year's imprisonment on the false swearing charge. The court of appeals affirmed (Pet. App. 1a-10a; 545 F. 2d 802).

The evidence showed that petitioner, a lawyer and former employee of the Small Business Administration (S.B.A.), served as a "finder" for four S.B.A. guaranteed bank loans.[1] Since each of the borrowers for whom petitioner performed this service was in serious financial difficulty, it agreed to pay petitioner ten percent of the proceeds of any loan he might succeed in obtaining for the company.

The S.B.A., however, requires that a prospective borrower indicate on its loan application whether any compensation has been paid or promised to anyone for services in connection with the procurement of the loan. Moreover, the agency will not approve a loan request which shows that a contingent finder's fee has been offered or paid.[2] Because he was aware of this rule, petitioner instructed his clients to omit reference to his services in their loan applications (Pet. App. 2a). As a result,

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[1]The S.B.A. has statutory authority to guarantee the repayment of 90 percent of the amount borrowed for certain purposes by small businesses. To obtain a guaranteed loan, the applicant must prepare and submit a standard application form to the commercial lender, which in turn forwards the request to the S.B.A. if it believes the request to be meritorious. 15 U.S.C. 636(a).

[2]15 U.S.C. 642 provides that no loan guaranteed by the S.B.A. may be made to any business unless its owners or officers certify to the Administration the name of any person engaged by the business for the purpose of expediting applications for assistance of any sort and the fees to be paid him. Administrative regulations also prohibit anyone from charging or proposing to charge a contingent fee for services performed in connection with an S.B.A. loan, unless the fee bears a necessary and reasonable relationship to services actually performed. 13 C.F.R. 103.13-5(c). The application form itself indicates that the S.B.A. will not approve a request listing placement or finder's fees based on a percentage of the loan.

three of the applicants failed to state that they had retained petitioner to obtain their loans and one applicant (Entre Nous Graphics, Inc.) affirmatively misrepresented that it had not utilized the services of petitioner or anyone else to procure the loan.

1. Petitioner contends (Pet. 4-11) (a) that he was improperly convicted as a principal under 18 U.S.C. 2(b), (b) that he was denied a fair trial by an improper remark in the government's closing argument, and (c) that his false declaration related to an immaterial matter. Each of these contentions is fully answered by the opinion of the court of appeals (Pet. App. 1a-10a), on which we rely.

2. Petitioner also contends (Pet. 11-12) that government misconduct requires reversal of the "Entre Nous" loan count. Since petitioner received a concurrent sentence of two years' imprisonment on each of the five counts related to the false loan applications, it is unnecessary for the Court to reach this claim. See *Andresen* v. *Maryland*, No. 74-1646, decided June 29, 1976, slip op. 5, n. 4; *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. It is in any event without merit.

The relevant facts are as follows: Allan Pollak, the president of Entre Nous Graphics, Inc., began cooperating with the government's investigation of petitioner after his company's application had been submitted to the bank. Before the loan was disbursed, however, the government served a subpoena on the bank seeking the records of the transaction. In light of the subpoena, the bank informed Pollak that it would not disburse the loan (Pet. App. 24a).

Because he was then in financial difficulty, Pollak asked the Assistant United States Attorney involved in the investigation for assistance in obtaining the release

of the funds. Thereafter, on two separate occasions the government attorney contacted the bank (*ibid.*). The attorney did not indicate that there were illegalities in the loan transaction, but rather suggested that the bank officer should use his independent judgment in deciding whether to disburse the loan (Pet. 11). On both occasions the bank determined to release the funds to Pollak.

There is no basis for petitioner's suggestion that the government's intervention on Pollak's behalf constituted an improper payment to him for his favorable testimony or that petitioner was prejudiced by this course of conduct. All of the evidence concerning the government's relationship with Pollak was presented to the jury for whatever weight it might have on the credibility of Pollak's testimony. Cf. *United States* v. *Gardner*, 516 F. 2d 334, 343-344 (C.A. 7), certiorari denied, 423 U.S. 861.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

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[3]The government conduct condemned in *United States* v. *Archer*, 486 F. 2d 670 (C.A. 2), bears no relation to that involved here. The concern in *Archer* was the manufacture by federal officers of federal jurisdiction for what was essentially a local crime. Here, the government merely chose not to interfere with an established business relationship on the basis of tentative conclusions during an ongoing criminal investigation.